

FILED
JUN 8 1984

No. 83-2015 (2)

ALEXANDER L. STEV
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

FIRST MULTIFUND ADVISORY CORP.,

Petitioner,

v.

HAROLD M. WILLIAMS, PHILIP A. LOOMIS, JR., JOHN R.
EVANS, IRVING M. POLLACK, and STEPHEN J. FRIEDMAN,
Individually, and Collectively, Constituting the SECURI-
TIES AND EXCHANGE COMMISSION, GEORGE A. FITZSIMMONS,
WARREN E. BLAIR, IRVING SCHILLER, PHILLIP D. PARKER,
and HOWARD SCHIFFMAN,

Respondents.

**SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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Attorney for Petitioner

4/8/84



This Court's recent decision in *Securities and Exchange Commission v. Jerry T. O'Brien Inc.*, 52 LW 4815 was published June 18, 1984, after the petition for the writ in this case was filed on June 8, 1984.

That decision and *Northern Pipeline*, 458 U.S. 50, 102 S.Ct. 2858 (1982) point up and highlight the need for and timeliness of this case. *O'Brien* held at 4816, with emphasis added:

"Congress has vested the SEC with broad *authority to conduct investigations* into possible violations of the federal securities laws . . . (and) the Commission is authorized to *bring suit in federal court* to compel compliance with its process. . . ."

It is respectfully suggested that the present case is an appropriate sequel to *O'Brien* and *Northern Pipeline*. No court has ever decided, and this Court now is respectfully requested to decide, whether or not

"Congress has vested the SEC with broad authority to (*elect not*) to bring suit in federal court" but instead to bring suit in its own in-house-court before its own nontenured administrative law judges.

That question is raised in the complaint. The SEC does not claim Congress has granted it that choice; and that, if granted, it would not violate Article III sections 1 and 2, and the 5th and 14th Amendments. The district court avoided that question by granting SEC's motion to dismiss the complaint. The circuit court affirmed on the district court's opinion.

The Solicitor General by notice dated June 22, 1984 waived the "right to file a response to the petition in this case, unless requested to do so by the Court."

Petitioner respectfully urges that, to save the Court's time and in the interest of justice, the Solicitor General should be requested to file a response, *which could terminate this case at once.*

1.—Then he could either concede Congress has not granted to SEC and its nontenured administrative law judges, authority to exercise the Judicial Power of the United States, concurrently and in competition with the district courts; —Or he could quote the sections of the statutes SEC and he rely on (if they can find any) to support their effort to avoid review of the judgment.

2.—He could either concede that even if Congress had expressly granted such adjudicatory powers to SEC and to its administrative law judges, such grant would violate Article III as this Court has enforced it in *Northern Pipeline* and its antecedents; —Or he could state his reasons for disagreeing.

3.—He could either concede that the court below erred in affirming dismissal of the complaint before trial, without even mentioning *Northern Pipeline*; *Hishon v. King & Spalding*, 52 L.W. 4627 (1984); *Public Affairs Press v. Rickover*, 369 U.S. 111 (1962); and *Aetna v. Haworth*, 300 U.S. 227; —Or he could state his reasons for disagreeing.

4.—He could either concede that this is a case of first impression which raises important questions of federal law which have not been and should be settled by this Court; —Or he could state his reasons for disagreeing.

Respectfully submitted,

MILTON MOUND

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Certificate of Service

I hereby certify that on July 3, 1984 I served the foregoing supplemental brief upon counsel by depositing three copies of it in a United States mailbox with first-class postage prepaid, addressed to Gerard S. Citera, Esq., Securities and Exchange Commission, Washington, D.C. 20549, and three copies to the Solicitor General, Department of Justice, Washington, D.C. 20530.

/s/ MILTON MOUND

MILTON MOUND

Attorney for Petitioner

July 3, 1984